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No. 91-447

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

FRANCIS RAVEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTION PRESENTED

Where the application of a federal criminal statute depends upon underlying property rights, should those property rights be defined by some uniform federal standard created especially for the purpose, or in accordance with the general property and commercial law of the state having jurisdiction over the property?

TOPICAL INDEX

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES CITED iv

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING REVIEW 4

THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT STATE LAW SHOULD GOVERN THE DEFINITION OF PROPERTY RIGHTS NECESSARY TO THE APPLICATION OF FEDERAL CRIMINAL STATUTES. 4

CONCLUSION 12

APPENDIX A:
United States v. Ravel
930 F.2d 721 (9th Cir. 1991) A-1

APPENDIX B:
Order Denying Petition for Rehearing
DATED: June 18, 1991 ..... B-2

APPENDIX C:
18 USC 659 ..... C-1

APPENDIX D:

California Commercial Code, Sec. 2403 . . . . . D-2

TABLE OF AUTHORITIES CITED

Page

Cases

Bishop v. Wood,
426 U.S. 341 8

Chicago Title Ins. Co. v. Sherred Village Assoc.
(1982) 544 F.Supp. 320 (1982) 5

Federal Land Bank of Wichita v. Ferguson
(10th Cir. 1990) 896 F.2d 1247 5

Pruneyard Shopping Center v. Robins,
447 U.S. 74 8

United States v. Certain Real Property at 2525 Leroy Lane
910 F.2d 343 (6th Cir. 1990) 5, 6

United States v. Kimbell Foods
(1979) 440 U.S. 715 . . . . . 4, 5, 6, 8
. . . . . 9, 11

United States v. Nardello,
393 U.S. 286 (1969) 7, 8, 11

United States v. Ravel
930 F.2d 721 (9th Cir. 1991) 2, 3, 10

United States v. Rorex,
737 F.2d 753 (8th Cir. 1984) 8, 9, 11, 12

United States v. Salinas
(5th Cir. 1977) 564 F.2d 688 7

United States v. Walter Dunlap & Sons, Inc.
(3rd Cir. 1986) 800 F.2d 1232 5

United States v. Yazell
(1966) 382 U.S. 341 . . . . . 4, 6

Statutes

Uniform Commercial Code 2-403 3
Uniform Commercial Code 2-403(1) 10
Uniform Commercial Code 2-403(2) 10, 11
Uniform Commercial Code 2-403(3) 10, 11
18 U.S.C. section 1952 6
18 U.S.C. sections 1961-68 . . . . . 6, 7
28 U.S.C. 1254(1) 2
318 U.S.C. 659 . . . . . 2, 3, 9

California Commercial Code section 240 2

Other Authorities Cited

Fields, *Sources of Law: The Scope of Federal Common Law*,
99 Harv.L.Rev. 881 (1986) 9

In the Supreme Court of the United States

October Term, 1990

FRANCIS RAVEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, FRANCIS RAVEL, respectfully prays that a writ of certiorari issue to review the published decision of the United States Court of Appeals for the Ninth Circuit, filed on April 11, 1991, in part affirming Petitioner's conviction. Petitioner's petition for rehearing from that order was denied on June 18, 1991. On July 5, 1991, the Ninth Circuit stayed issuance of the mandate until September 13, 1991.

OPINION AND ORDERS BELOW

The April 11, 1991 opinion of the United States Court of Appeals for the Ninth Circuit, 930 F.2d 721, is attached hereto as Appendix A. The Ninth Circuit's June

18, 1991 order denying Petitioner's petition for rehearing and suggestion for hearing *en banc* is attached as Appendix B.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied the petition for rehearing on June 18, 1991. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 659, the text of which is attached hereto as Appendix C.

California Commercial Code section 2403, the text of which is attached hereto as Appendix D.

STATEMENT OF THE CASE

On January 14, 1986, a shipment of Epson printers and other equipment was stolen. In January and February, 1986, Petitioner, Francis Ravel, then the owner of Olympic Sales Company, bought 400 Epson printers and related equipment. 930 F.2d 721, 723; RT 462-63, 592, 597-98.

Though the dealers from whom he bought claimed they acquired the units from a bankrupt business, they were in fact from the stolen shipment. Ravel testified that before buying the goods he called Epson to ask if any of their

shipments had been stolen, and was told that they had not. 930 F.2d 721, 723. Epson West did not inform its dealers of the January 14, 1986 theft until its quarterly newspaper, dated March 10, 1986. RT 391-92.

Ravel was found guilty of two counts of possession of stolen goods in violation of 18 U.S.C. sec. 659, and acquitted of a third. 930 F.2d 721, 723. On appeal, the Ninth Circuit found that the two counts on which Ravel was convicted formed a "single continuous act which constitutes one unit of prosecution." The court therefore declared them to be a single offense, and remanded the case for resentencing. 930 F.2d at 724.

At trial, and again on appeal, Ravel also contended that the trial judge should have instructed the jury in accordance with California commercial law (UCC section 2-403) that Ravel had a right to keep the goods, and was therefore not guilty, if Epson invested the possessor with apparent authority to pass title by its failure to give notice of the theft. 930 F.2d 721, 725.

The Ninth Circuit acknowledged that state law *might* be relevant to defining the status of property under section 659, but rejected the application of UCC section 2-403 here on the basis that there was no evidence that "Epson had entrusted the goods to the thieves." 930 F.2d at 725. The court therefore affirmed the single remaining count of possession. 930 F.2d 721, 726.

REASONS FOR GRANTING REVIEW

THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT STATE LAW SHOULD GOVERN THE DEFINITION OF PROPERTY RIGHTS NECESSARY TO THE APPLICATION OF FEDERAL CRIMINAL STATUTES.

In *United States v. Kimbell Foods* (1979) 440 U.S. 715, building on earlier decisions such as *United States v. Yazell* (1966) 382 U.S. 341, this Court enunciated, a comprehensive test for determining when an issue of federal law should be decided in accordance with a uniform national rule, and when on the basis of the law of the state in which the case arises, "incorporated" into the federal statute, "as the federal rule of decision." 440 U.S. at 728.

According to *Kimbell Foods*, the considerations to be taken into account in deciding whether to apply a single federal rule or incorporate the laws of the several states are: (1) whether uniformity is necessary; (2) whether the application of state law would frustrate the objectives of the federal statute; and, (3) "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." 440 U.S. at 729.

In *Kimbell Foods* itself, the issue was whether federal security interests should take precedence over private liens on the same property. For that purpose, this Court decided in favor of incorporating state law into the federal statute, stating that

> "we decline to override intricate state laws of general applicability on which private creditors base their daily commercial decisions."
>
> 440 U.S. at 729.

The application of the *Kimbell* test has led to decisions in favor of state law in a variety of contexts. See, *e.g.*, *Chicago Title Ins. Co. v. Sherred Village Assoc.* 544 F. Supp. 320 (1982); *United States v. Walter Dunlap & Sons, Inc.* (3rd Cir. 1986) 800 F.2d 1232; *Federal Land Bank of Wichita v. Ferguson* (10th Cir. 1990) 896 F.2d 1247. Most relevant here is its application in *United States v. Certain Real Property at 2525 Leroy Lane* 910 F.2d 343 (6th Cir. 1990).

In *Leroy Lane*, the Sixth Circuit applied *Kimbell* to a forfeiture resulting from conviction of drug offenses. The question was what impact the forfeiture law should have on the interest of an innocent spouse in real estate held as "a tenancy by the entirety." Despite the language in the criminal forfeiture act making the forfeiture "irrespective of any provision of State law," the *Leroy Lane* court decided

that the extent of the property interests to be forfeited should be determined on the basis of state law, rather than in accordance with "a spontaneous federal law of property." 910 F.2d at 348-49.

The *Leroy Lane* court, while understanding Congressional intent to be to ensure that the guilty not have access to state law to protect themselves against forfeitures, concluded that

> "[t]he protection of the interest of an innocent owner as that interest is defined under state law is not inconsistent with federal forfeiture policy."
>
> 910 F.2d at 349.

In coming to this conclusion, the court drew upon this Court's reasoning in *United States v. Yazell*, 382 U.S. 341, *supra*, to the effect that "[f]orfeiture proceedings implicate property rights which have traditionally been measured in terms of state law." 910 F.2d at 349.

No court, however, has yet explicitly applied the *Kimbell* analysis to the definition of federal criminal offenses.

Even in cases where the federal statute explicitly refers to state law (such as the Travel Act, 18 U.S.C. section 1952, and RICO, 18 U.S.C. sections 1961-68) the federal courts, following this Court's lead in *United States v.*

Nardello, 393 U.S. 286 (1969), have tended to downplay the significance of state law, holding that the substance of state prohibitions should be taken into account, but that the specific terminology in state statutes could be disregarded. See *United States v. Salinas* (5th Cir. 1977) 564 F.2d 688.

Thus, in *Nardello* itself, this Court decided that the defendants were travelling in interstate commerce for the purpose of "extortion" in violation of the law of Pennsylvania, despite the fact that the Pennsylvania law penalized the particular acts they committed, not as extortion but as blackmail. 393 U.S. 286, 295.

In *Salinas*, the court found that a Texas law making gambling illegal was sufficient to support a RICO prosecution for collection of gambling debts illegal under state law, despite the fact that Texas had no law expanding on the crime of gambling and making the "business of gambling" illegal. 564 F.2d 688, 691.

In the *Nardello* line of cases, however, the activities penalized *were* illegal in the states where they took place, and no property rights of ostensibly innocent parties were affected. There was, therefore, no reason to believe that the "application of a federal rule would disrupt commercial relationships predicated on state law." 440 U.S. at 729.

But the approach which was proper for delineating the borderline between extortion and blackmail in *Nardello*

is not appropriate for distinguishing between the property of one person and that of another. Such issues are governed by a substratum of state law which defines property rights and upon which many "base their daily commercial transactions." *Kimbell*, 440 U.S. at 729, *supra*.

As this Court has reiterated a number of times, and in many contexts, it is the states, not the federal government which possess "residual authority" to "define property in the first instance." *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 at 85, and "the sufficiency of a claim of entitlement" to property rights "must be decided by reference to state law." *Bishop v. Wood*, 426 U.S. 341 at 344.

In the one published decision before the instant case requiring the definition of an offense in relation to the underlying commercial and property law of the state, *United States v. Rorex*, 737 F.2d 753 (8th Cir. 1984), however, the court flatly rejected the suggestion that state commercial law could be relevant to federal criminal law. The *Rorex* court, in affirming the conviction, swept aside a claimed defense under the Uniform Commercial Code with the terse comment that the applicable law was "not the Arkansas UCC but 18 U.S.C. 659." 737 F.2d at 757.

Here, as in *Kimbell Foods*, the question is whether property rights should be settled by the formulation of some uniform federal standard, or on the basis of the property and commercial law of the state. Here, as in *Kimbell Foods*,

the question *should* be whether the formulation and application of a federal standard would "disrupt commercial relationships predicated on state law."

The answer in this and similar cases is clear: for federal courts to hold innocent purchasers criminally liable for possessing goods which are their rightful property under the state law having jurisdiction over them would certainly "disrupt commercial relationships predicated on state law." Where property rights are at stake,

> "uniformity within each state seems more important than national uniformity."
>
> Fields, *Sources of Law: The Scope of Federal Common Law*, 99 Harv.L.Rev. 881 at 959 (1986).

The crucial thing is that the federal courts not make rulings on property rights which conflict with those of state courts and thereby render property relations insecure. *Kimbell Foods*, 440 U.S. 715, 739-40, *supra*.

The Court of Appeal here did not dismiss state commercial law out of hand as the *Rorex* court did, but it did, through its narrow construction of Ravel's contentions, miss the opportunity to establish a clear alternative to the *Rorex* court's short-sighted rejection of state commercial law.

The Court of Appeal rejected Ravel's commercial law defense on the basis of a finding that his case did not fall within the precise ambit of UCC sub-sections 2-403 (2)

and (3) as amended and interpreted in California. 930 F.2d 721, 725-26. In doing so, the court overlooked the legal core of Ravel's argument.

Though Ravel did refer to subsections UCC 2-403 (2) and (3) in his argument on appeal (OB 24), his defense, both at trial and on appeal (see Docket No. 46: Defendant's Combined Reply, pp. 16-18; OB 22-27), was founded on the more general language of section UCC 2-403 (1), and its embodiment of the common law doctrine of estoppel.

Ravel relied on UCC section 2-403 (1) to establish that Appellant acquired all of the title his transferors had the "power" to transfer, and that common law estoppel is one source of power to transfer title under this section. Ravel contended that there was such an estoppel here: that Epson's actions gave rise to "the apparent rightful possession and apparent ownership of Ravel's transferors," and that gave these men "the power to transfer Epson's title to Ravel" (Docket No. 46, at p. 17).

In dealing with the defense solely on the basis of the narrow of UCC sub-sections 2-403 (2) and (3), therefore, the Court of Appeal eschewed the opportunity to apply the far broader, and more generally applicable, principles of common law estoppel.

Seen in the broader perspective of Ravel's estoppel argument, the instant case offers *this* Court an

opportunity to deal with the problem of ensuring that federal criminal statutes are not interpreted so as to "disrupt commercial relationships predicated" on such familiar doctrines of state property law as common law estoppel.

In this context, the Court could further clarify and reinforce its *Kimbell Foods* doctrine by applying it to the interpretation of federal criminal statutes to the extent that their applicability depends upon underlying property relationships. It could then fix the boundary between those cases, like *Nardello*, in which the formulation and application of a uniform federal law is appropriate, and those, like the instant case, in which state law should be applied.

The alternative is to leave *Rorex*, with its peremptory rejection of the relevance of state commercial law to federal criminal law, as the sole clear precedent in the field.

Guided by *Rorex*, district courts will do what the trial court did here: simply refuse to consider the relevance of state commercial and property law. Such an approach will *guarantee* that established commercial and property relations within the affected states will be rendered insecure by the application of "a spontaneous federal law of property" which is bound at times to conflict with the general commercial and property law of those states.

Only this Court's intervention can establish a firm structure within which to harmonize the federal criminal law

with state commercial and property law. This Court should grant review here in order to achieve that goal.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this Court grant his writ of certiorari.

Respectfully submitted,

ROBERT S. GERSTEIN

Counsel for Petitioner

APPENDIX A

FEDERAL REPORTER, 2d SERIES

930 F.2d 821 (9th Cir. 1991)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS RAVEL, Defendant-Appellant

No. 89-59247

United States Court of Appeals. Ninth Circuit

Argued and Submitted Aug. 10, 1990

Decided April 11, 1991.

Defendant was convicted of two counts of possessing stolen goods, in the United States District Court for the Central District of California, Mariana R. Pfaelzer, J., and defendant appealed. The Court of Appeals, Leavy, Circuit Judge, held that: (1) defendant's possession of 30 items sold on one date and 12 items seized by Federal Bureau of Investigation 13 days later was single continuous act which constituted one unit of prosecution; (2) defendant was not entitled to jury instruction on whether he had been invested with right to retain possession of goods under California Uniform Commercial Code, where there was no contention that owner had entrusted goods to thieves; and (3)

prosecutor's statements during closing argument that defendant was in "best position" to produce sellers of goods and that such sellers could have helped defense was not plain error.

Affirmed in part, reversed in part and remanded.

Robert S. Gerstein, Santa Monica, Cal., for defendant-appellant.

Mark J. Werksman, Asst. U.S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before REINHARDT and LEAVY, Circuit Judges, and KING*, District Judge.

LEAVY, Circuit Judge:

A jury convicted Francis Ravel ("Ravel") on two of three counts of possessing stolen goods. Ravel now appeals arguing that the district court erred by denying his

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* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

motion to dismiss all but one count, by denying his request for the use of expert testimony and rejecting his requested jury instruction on the Uniform Commercial Code ("UCC") by failing to answer properly a question posed by the jury during its deliberations, and by denying his motion for a new trial based on allegedly inflammatory comments made by the prosecutor during closing argument. we affirm in part, reverse in part and remand.

FACTS AND PROCEEDINGS

On January 14, 1986, an interstate shipment of Epson computer equipment was stolen in Ontario, California. The driver of the truck from which the goods were taken reported the theft to the local police and to persons at Epson's warehouse in Carson, California. Epson West, a regional distributor of Epson computer equipment, did not notify local dealers of the theft until March 1986, when it was announced in the company's quarterly newsletter. As an Epson retailer, Ravel received a copy of the newsletter.

Meanwhile, Ravel as the owner of Olympic Sales Company of Los Angeles, purchased in three lots on

three separate occasions a total of 400 Epson computer printers, as well as other related equipment, from two men who claimed that the items came from a bankrupt business. Ravel paid a total of $60,000 in currency and received, in addition to the computer equipment, three hand-printed "receipts," none of which identified the goods by quantity or serial number. Ravel testified that, prior to acquiring the goods, he telephoned Epson to find out whether any of its computer shipments had been stolen and was told that Epson knew of no such loss. Shortly thereafter Ravel placed some of his computer inventory, including most of the stolen items, in rented warehouse space.

Upon learning that Ravel had sold 20 of the stolen Epson printers to PC Upgrades of Van Nuys, California, the Federal Bureau of Investigation ("FBI") appeared at Ravel's place of business on March 15, 1986, and confiscated 62 stolen printers. At no time during the search of his business did Ravel tell the FBI of the more than 300 stolen items still in his inventory. Two days later the president of Epson received a letter from Ravel stating that Ravel had learned of the theft through the company's quarterly newsletter, that he was assisting the authorities in their search, and that he wanted a list of the

stolen items' serial numbers. On that same day, Ravel rented a bin at a self-storage warehouse in Hollywood under the fictitious name of F. C. Levar (i.e., Ravel spelled backwards), where he transferred more than 300 items of computer equipment, including stolen Epson printers.

The following week Ravel met with a representative of Epson West, and without disclosing that he was hiding more than 300 stolen Epson printers and related equipment, demanded reimbursement of the amount he claimed to have paid for those goods. His demand was rejected.

On July 8, 1986, Ravel sold 30 of the stolen printers to Jade Computers of Hawthorne, California. On July 25, 1986, the FBI returned to Ravel's place of business and seized 12 more stolen printers. Again, Ravel made no mention of the stolen computer equipment he had in storage. On January 5, 1987, Ravel directed a private investigator hired by Epson's insurer to the Hollywood self-storage bin, where the remaining stolen goods were recovered.

On October 4, 1988, a federal grand jury handed down a superseding indictment charging Ravel with three counts of possessing stolen goods, all in violation of 18

U.S.C. section 659. Specifically, Ravel was charged with: Count I, possessing 30 stolen Epson printers on July 8, 1986 (the 30 sold to Jade Computers on that date); Count II, possessing 12 stolen Epson printers on July 25, 1986 (the 12 seized by the FBI on that date); and Count III, possessing 380 stolen Epson printers, monitors, and keyboards on January 5, 1987 (the goods found by the investigator on that date). Ravel pleaded not guilty and proceeded to trial. The jury returned a verdict of guilty on Counts I and II and not guilty as to Count III. Ravel was sentenced to two concurrent five-year terms of probation and he has timely appealed.

DISCUSSION

I

Ravel first argues that the district court misinterpreted 18 U.S.C. Section 659 in its determination of the appropriate unit of prosecution by holding that Ravel could be charged with and tried on three separate counts of possessing stolen merchandise when the goods in question all came from a single stolen shipment.

Title 18, section 659 stated, in relevant part:

> Whoever buys or receives or
> has in his possession any . . .

> goods [stolen from an interstate shipment], . . . knowing the same to have been stolen . . .[,] . . . [s]hall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both[.]

[1] We review de novo a district court's interpretation of a statute for the purpose of determining the appropriate unit of prosecution thereunder. *United States v. Douglass*, 780 F.2d 1472, 1477 (9th Cir. 1986) (unit of prosecution under 18 U.S.C. Section 1952).

[2] The indictment does not charge Ravel with three separate counts of buying or receiving stolen goods relating to the three occasions when he purchased the goods, but rather with three counts of possession coinciding with the dates on which his possession of the goods terminated, first by sale to Jade Computers, second by seizure by the FBI, and third by seizure by the insurance investigator. Because of our holding, we need not decide whether possession of stolen goods all from a single shipment can constitute more than one unit of prosecution, nor do we need to decide whether goods stolen from a single shipment but acquired on three

separate occasions may give rise to three units of prosecution *Cf. United States v. Gann*, 732 F.2d 714, 721 (9th Cir.) (receipt of goods on separate occasions and storage in separate locations supported separate units of prosecution under 18 U.S.C. Section 922(h), *cert. denied*, 469 U.S. 1032, 105 S.Ct. 505, 83 L.Ed.2d 397 (1984). Likewise, we need not concern ourselves with Count III of the indictment because of Ravel's acquittal on that count.

We hold that Ravel's possession of the 30 items sold on July 8 and the 12 items seized on July 25, is a single continuous act which constitutes one unit of prosecution.

[3] In a case involving a conviction on multiple counts of receiving stolen goods in violation of, *inter alia*, 18 U.S.C. Section 659, the Court of Appeals for the 11th Circuit rejected the argument that the appropriate unit of prosecution should be determined by *when* the government seizes those goods. *Ward v. United States*, 694 F.2d 654, 660 & n. 9 (11th Cir. 1983). We agree, and hold that the crime of possession of stolen goods cannot be fragmented, either on the basis of when the government elects to seize a particular portion of the goods or when the defendant disposes of a portion. *Cf. id. See also United States v. Anderson*, 709 F.2d 1305, 1306

(9th Cir. 1983) (theft of six parcels on one occasion required consolidation of multiple counts into single unit of prosecution under 18 U.S.C. Section 1708), *cert. denied*, 465 U.S. 1104, 104 S.Ct. 1605, 80 L.Ed.2d 135 (1984). We therefore remand with instructions that the district court declare Counts I and II to be a single offense and resentence accordingly.[1]

II

Ravel next argues that the district court erred by denying both his request for a jury instruction and his offer of expert testimony on the status of the goods as "stolen" under the UCC. While this court has not definitively ruled whether a district court's refusal to accept a proffered instruction should be reviewed de novo or for an abuse of discretion, *see United States v. Davis*, 876 F.2d 71, 72 (9th Cir.) (per curiam), *cert. denied*, --- U.S. ----, 110 S.Ct. 188, 107 L.Ed.2d 143 (1989), we need not resolve this question, as the result would be the same regardless of which standard were employed.

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[1]Because we conclude that the acts with which Ravel had been charged constitute a single crime under 18 U.S.C. Section 659, we need not and do not address his claim of error concerning the jury's request for clarification during its deliberations and the court's supplemental instruction thereon.

Ravel requested an instruction relating to his contention that he had obtained at least a voidable title to the goods and could not have been guilty of criminal possession thereof. It was based upon the California version of UCC Section 2-403, and reads as follows:

> If, from the evidence, you find that title to the goods in Defendant's possession did not pass to him before he acquired knowledge the goods were stolen but, by their conduct, the owners of the goods invested Defendant with the right to retain possession of the goods, then such possession would not be criminal even against subsequent demands for the return thereof.

[4] The government argues that Ravel was not entitled to an instruction based on the UCC because federal law, rather than state law, controls. In support of its position, the government cites the Eighth Circuit's decision in *United States v. Rorex*, 737 F.2d 753, 757 (8th Cir. 1984), and UCC section 7-103, which recognizes the supremacy of federal law over the UCC. While we acknowledge that federal law defines the crime for which

Ravel was convicted, we note also that state law, including the UCC, may be relevant to the determination of whether property is "stolen" for purposes of interpreting a federal criminal statute. *See, e.g., United States v. Luttrell*, 889 F.2d 806, 810 (9th Cir. 1989) (citing the UCC to reject defendant's argument that credit card drafts were not "lost, stolen, expired, revoked, canceled, or obtained with intent to defraud" under 18 U.S.C. Section 1029(e)(3)), *amended on other grounds*, 923 F.2d 764 (9th Cir. 1991) (en banc). We may assume without deciding that UCC Section 2-403 could provide a defense to the charge of possession of stolen goods under 18 U.S.C. Section 659, because even on that assumption Ravel was not entitled to his proposed jury instruction.

[5] Ravel's theory of the case was that Epson, by failing to notify him that the machines were stolen, and by subsequently failing to provide the serial numbers of the stolen machines, "invested [him] with the right to retain possession of the goods." However, he overstates the scope of section 2-403. That provision is designed to deal with a situation where A buys goods from B, only to discover that B did not have the right to sell the goods because they really belonged to C. Section 2-403 provides that if C "entrusted" the goods to B, and B is in the

business of selling the type of goods entrusted, as between A and C, A has a superior claim to the goods. *See generally* W. Hawkland, 2 *Uniform Commercial Code Series*, Section 2-403:07 (1984).[2]

It is clear that section 2-403 has no bearing on Ravel's case. Ravel bought the goods from thieves who stole them from a truck. There is no contention that Epson entrusted the goods to the thieves.

[6] Moreover, even if section 2-403 provided that someone who buys stolen goods may keep those goods in his possession when the rightful owner subsequently "entrusts" the goods to him, Ravel would not have been entitled to the proposed UCC instruction because he offered insufficient evidence of entrustment. The most that can be said is that Ravel introduced evidence of Epson's failure to notify him that the goods were stolen and the failure of one of Epson's employees to provide serial numbers. These omissions did not rise to the level of a knowing transfer of control contemplated by UCC Section 2-403(3), which states that "[e]ntrusting

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[2] California has amended section 2-403, but that amendment makes it more *difficult* for a buyer of stolen goods to establish title to the goods than under the standard version of section 2-403. See *Budget Rent-A-Car v. Bergman*, 121 Cal.App.3d 256, 263, 175 Cal.Rptr. 286, 290 (1981).

includes any delivery and any acquiescence in retention of possession" of the goods in question.

"A trial court must instruct the jury on a defendant's theory of the case only if the evidence sufficiently supports the theory and the theory is supported by law." *United States v. Sommerstedt*, 752 F.2d 1494, 1496 (9th Cir.), *modified on other grounds*, 760 F.2d 999, *cert. denied*, 474 U.S. 9851, 106 S.Ct. 149, 88 L.Ed.2d 123 (1985). Because the evidence introduced by Ravel did not support his theory, and because that theory was in any event legally unsound, the district court did not err by rejecting his proposed jury instruction.

Our review of the trial court's instructions to the jury shows that the instructions given covered both the essential elements of the crime with which Ravel had been charged and properly explained his defense of lack of knowledge that the goods were stolen. Accordingly, the district court did not err in denying Ravel's request for a jury instruction on this issue.

[7] Turning next to Ravel's argument concerning the need for expert testimony, we note that a district court's in limine order precluding such testimony is an evidentiary ruling subject to review for an abuse of

discretion. *United States v. Komisaruk* 885 F.2d 490, 492 (9th Cir. 1989).

[8, 9] Expert testimony is inappropriate to bolster the credibility of a defendant. *Komisaruk*, 885 F.2d at 494; *United States v. Brodie*, 858 F.2d 492, 496 (9th Cir. 1988). The expert would have testified as to the reasonableness of Ravel's belief that the goods were not stolen, based on the UCC provision discussed above. It was within the district court's discretion to conclude that such testimony would have been of no appreciable help to the jury, but would have served instead only to confuse it. *See* F.R.Evid. 702; *United States v. Miller*, 874 F.2d 1255, 1266-67 (9th Cir. 1989); *United States v. Amaral*, 488 F.2d 1148, 1152 (9th Cir.) 1973). Accordingly, we find no abuse in the district court's ruling on these points, either.

III

Finally, Ravel argues that the prosecutor made improper statements during closing argument concerning Ravel's being "in the best position" to produce the two men who had sold him the computer goods and that these witnesses could have helped his defense. Ravel contends that this comment both prejudiced his defense and acted

to shift the burden of proof thereon. Neither contention has any merit.

[10, 11] We note that Ravel neither objected to the prosecutor's comments nor requested a curative instruction. Accordingly, we will only reverse on these grounds if we find plain error, *i.e.*, that "the prosecutor's misconduct would . . . have changed the verdict." *United States v. Kessi*, 868 F.2d 1097, 1107 (9th Cir. 1989). The record shows that the prosecutor's comments were made in response to Ravel's statement during closing argument that the government had failed to produce the two witnesses and had not therefore proven its case.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX B

FILED
June 18, 1991
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANCIS RAVEL, Defendant-Appellant.	No. 89-50247 D.C. No. CR 88-0479-MRP ORDER

Before: REINHARDT, LEAVY, Circuit Judges, and KING*, District Judge.

The panel has voted to deny the petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc, and Judge King has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

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* Honorable Samuel P.King, Senior United States District Judge for the District of Hawaii, sitting by designation

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX C

UNITED STATES CODE

18 Section 659 CRIMES

Section 659. Interstate or foreign shipments by carrier; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his

possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen, or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have ben embezzled or stolen --

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100 he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have take or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been

stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section, the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property.

A judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any prosecution under this section for the same act or acts. Nothing contained in this section shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this section operate to the exclusion of State laws on the same subject matter, nor shall any provision of this section be construed as invalidating any provision of State law unless such

provision is inconsistent with any of the purposes of this section or any provision thereof.

APPENDIX D

CALIFORNIA COMMERCIAL CODE

Section 2403. Power to transfer; Good Faith Purchase of Goods; "Entrusting". (1) A purchaser of goods acquires all title which the transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) The transferor was deceived as to the identity of the purchaser, or

(b) The delivery was in exchange for a check which is later dishonored, or

(c) It was agreed that the transaction was to be a "cash sale," or

(d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like, regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods are governed by the divisions on secured transactions (Division 9), bulk transfers (Division 6) and documents of title (Division 7). (Stats. 1963, c. 819, Section 2403.)